No. **13509**

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT J. CYR, WARREN H. PILLSBURY, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, Thirteenth Compensation District, and WILLIAM LASCHE,

Appellants,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,

Appellees.

Appeal from the United States District Court for the Southern District of California, Southern Division

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BRIEF FOR APPELLEES CRESCENT WHARF & WAREHOUSE COMPANY AND PACIFIC EMPLOYERS INSURANCE COMPANY

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Question Involved

One of the main questions involved here is whether a consequential injury arises out of the employment where it is due to a new and added peril to which the employee has needlessly exposed himself. Another question is whether or not the District Court is bound

to unqualifiedly accept the findings of the Deputy Commissioner. Finally, there is the question of whether or not a causal relationship between the injury and the employment must be established before a compensation award is justified.

I

A Consequential Injury Cannot be said to Arise Out of the Employment where it is Due to a New and Added Peril to Which the Employee by His Own Conduct Has Needlessly Exposed Himself.

No one would take issue with counsel for appellants' statement that negligence or fault of the applicant is not a defense to a claim under most Workmen Compensation Acts. This statement, however, should be set in its proper context as referring to an injury which occurs in the course of the employment and arises out of the employment. It is the contention of the appellees that in view of the original injury received by Lasche, he failed to use reasonable care and exposed himself to an unreasonable risk that resulted in the second injury and that this failure to use reasonable care bars him from recovering from appellees for the results of the second injury. Appellees cite the following authorities in support of the above:

In *58 American Jurisprudence, Workmen's Compensation*, Section 200, page 709, it is said:

> "A distinction is to be observed in respect of the negligence or misconduct of the employee be-

fore and after the occurrence of the accident or injury upon which the claim is founded, it being generally agreed that there is no right to compensation for disability or death proximately resulting from negligence or misconduct on the part of the employee subsequent to the original injury."

And again, in *58 American Jurisprudence, Workmen's Compensation,* Section 322, page 801, it is said:

"It is universally recognized that it is the duty of an injured employee to exercise reasonable care to minimize the effect of the injury, and it has been held accordingly in a number of cases, that compensation cannot be allowed for such disability as proximately results from the negligent omission of the employee to care for the injury. The test of negligence in such cases is whether a person of ordinary prudence would have followed the same course of conduct under like circumstances."

In discussing the problems of subsequent injury and aggravation of original injury, the authors of *American Jurisprudence in Vol. 58* at page 775, state as follows:

"A subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury . . . . On the other hand, the facts and circumstances may be such as to establish the second injury as an independent, intervening cause, the effects of which cannot be included in computing the compensation allowable for the original injury, the determination of the question in each case being one of fact to be decided on the evidence."

The same general subject matter is discussed in 54 A.L.R. 642 under the subject "Workmen's Compensation—Neglect of Injury . . . Premature Use of Injured Member", where it is said:

> "Where the incapacity suffered by the employee is not caused by the accident, but by his own misconduct in faliing properly to care for the injuries, it was held in *Pacific Coast Casualty Co.* vs. *Pillsbury*, 171 Cal. 319, 153 Pac. 24, that an additional injury caused by using an injured arm too soon does not arise out of the employment.
>
> "The aggravation of an injury caused by the employee engaging in a boxing match, where the wound had practically healed and would have caused no further trouble had it been given a little more rest, is the proximate cause of the incapacity, and no recovery can be had therefor under the Workmen's Compensation Act."
>
> *Kill* vs. *Industrial Comm.* 160 Wis. 549, 152 N.W. 148

Again, in 7 A.L.R. 1186, it is said at page 1188:

> "And in *Blackall* vs. *Winchester Repeating Arms Co.*, 1 Conn. *Comp. Dec.* , 183, where an employee suffering from an incurable disease fell while engaged in her employment and received an injury which would ordinarily have been trivial, and before she was able she left her bed and fell again on account of weakness, and sustained injuries which hastened her death by aggravating the disease, it was held that death was not due to the original injury and had no causal connection

> with it, but that compensation should be allowed only for the period of incapacity which would ordinarily result from the original injury."

A case which inferentially holds that fault of the employee is to be considered where there is consequential injury is *Otoe Food Products Co.* v. *Cruickshank,* 141 Neb. 298, 3 N.W. (2d) 452, 142 A.L.R. 816. There the employee suffered an accident to his right eye in the course of his employment. Later another accident occurred not in the course of employment and his right eye was again affected. In discussing this the Court said:

> "The medical experts were unable to determine the degree of disability, if any, caused by the second accident, as distinguished from the first accident, or just how much, if any, the second accident contributed to the loss of vision of the employee's right eye. It was not wilfully or negligently brought about through any conduct of the employee and he in no manner contributed to it . . . . ."

Two California cases have discussed this problem. In *Pacific Coast Casualty Co.* vs. *Pillsbury,* 171 Cal. 319, 153 Pac. 24, the employee received a broken arm in the course of his employment. A month later, while on a private trip, it was found that the bones had slipped. The Industrial Accident Commission gave an award for this new disability. This was held to be error. At page 323 the Court said:

"An examination of the act in question shows that the legislature has not even attempted to provide compensation for such collateral injuries, or to empower the Industrial Accident Commission to do so. It creates a liability against an employer in favor of his employee only 'for any personal injury sustained by his employees by accident arising out of the employment and in the course of the employment' and in favor of dependent persons of death ensues from such injury (Citing statute). Certain conditions must concur but they do not enlarge the scope of the above quoted language. This clearly does not include an additional injury to the employee from an accident to him occurring after the employment had ceased and while he was engaged in his own affairs outside of and not connected with his employment.

"This would be true as well where the subsequent injury is occasioned by the negligence of the injured person, or of some third person, without accident, as where it is accidental, if the subsequent injury occurs after the employment has ceased and is neither the natural nor the proximate result of the injury received in the course of the employment. Under the law in force prior to the Workmen's Compensation Act the principle was well established that a person injured by the negligence of another must use ordinary care to avoid aggravating or prolonging the effects of such injury, and that he cannot recover for an increase of disability caused by his failure to use such care (citing cases). An additional injury to McCay caused by carelessly using his arm too soon, is as much a new injury, not within the terms of

> the constitution or statute, as if it had occurred by accident. The Commission, upon the facts shown, was therefore without power to award compensation for the additional disability or for the expenses caused by the slipping of the broken parts of the bone."

In *Head Drilling Co.* vs. *I.A.C.*, 177 Cal. 194, 170 Pac. 157, the employee fractured his leg in the course of employment. Less than two months later he struck the heel of the injured leg on a table at home causing a new separation of the bones. This was held to be compensable, but the court noted that the employee had not been negligent in respect to the consequential injury. At page 197 it was said:

> "According to this there was nothing but the accidental striking by Scott of the heel of the foot of the injured limb against the pedestal of the table or chair, done in an attempt to save himself from a fall, something to have been reasonably anticipated when he was discharged from the hospital in the condition in which he then was, *and all of which happened without any negligence on his part.*" (Emphasis added)

In concurring opinion Justice Shaw stated at page 198:

> "It follows that a 'further disability' not caused by the original injury, but by the employee's own negligence and not happening in the course of a subsequent employment by the same employer, and arising out of it, is not compensable at all under the act. This being so, the award for the further

> disability here under review can be sustained only upon the ground that the subsequent accident and resulting displacement of the fractured bone was not the result of a lack of ordinary care on the part of the injured employee . . . . The finding of the Commission is in effect a finding that at the time of the second accident Scott was not guilty of a lack of the ordinary care which reasonably prudent persons in his condition exercise for their own safety from injury."

The Supreme Court of Oklahoma has also touched on this subject. In *Deep Rock Oil Corp.* vs. *Betchen,* 35 Pac. (2d) 905 at page 908 it said:

> "It seems that a law designed to compensate workmen for loss of earning capacity from industrial accidents must have been intended to extend its shield at least to aggravation affecting the course of the injury during convalescence when such are produced by not unnatural events and involve no omission or breach of duty . . . . In *Tippett & Bond* vs. *Moore,* 167 Okla. 636, 31 P. 2d 583, our court held disability referable alone to a first injury when a second one had intervened to precipitate further incapacity. The principle is a familiar one in tort law and was stated in *Hoseth* vs. *Preston Mill Co.,* 49 Wash. 682, 96 P. 423, 425, in this language: 'The rule is that the injured person must exercise reasonable care to effect a cure, both as to the selection of a physician and as to his own personal conduct, and if he does so he may recover all damages flowing naturally and proximately from the original injury . . .' "

Two cases under the Longshoremen's Act have discussed the problem of the conduct of an employee in respect to his injury. In *Ocean S. S. Co. of Savannah, et al.* vs. *Lawson, et al.*, 68 F(2d) 55, one Lee was injured December 20, 1928 while working aboard ship. His foot was caught in a moving stage. He was discharged from the hospital on December 28th and on January 3rd was in Florida wtih his foot unbandaged, in colored sock and infected. He died January 10, 1929. Deputy Commissioner found that accident of December 20th was a contributing cause of his death. On page 56 it was said:

> "The main disputable fact before the Commissioner was whether the infection which killed him resulted naturally or unavoidably from his injury or was caused by his own mistreatment and exposure of his wound. We do not think the findings of the Commissioner answer this question and by consequence they do not establish a case for a death award. By a fair construction of the statute a death caused by infection following an injury is caused by the injury if the infection followed naturally or unavoidably; but, if the infection is not natural but extraordinary and if it could by *reasonable care* have been *avoided*, death is not to be considered as due to the injury . . . . . It follows that his fact findings must be specific and be sufficient under the law to support the award. Florida vs. U. S. 282, U. S. 194"

In the case of *Penn. Stevedoring Corp.* vs. *Caudillo*, 72 Fed. Supp. 991 (1947) the facts in brief were that

the employee was drowned when he left his gasoline tractor on one float and went to an adjoining float. The adjoining float did not belong to his employer. At page 994 the court said:

> "Plaintiffs rely on 71 C.J. 657: 'An accident cannot be said to arise out of the employment where it is due to a new and added peril to which the employee by his own conduct has needlessly exposed himself, unless there has been an acquiescence by the employer.' "

But the court held that in this case there was evidence sufficient to establish acquiescence by the employer. In our instant case no such acquiescence can possibly be found as the employer did not know that applicant was going to climb a ladder in the garage of his residence.

In respect to the *Ocean S. S. Co case,* supra, it should be noted that the trial judge relied heavily on this case in his decision. Yet counsel for appellants have not cited or discussed this case in their brief. They cannot deny that this case holds that if the consequential injury (infection here) could have been avoided by reasonable care, it is not compensable.

In summary then, the above authorities hold that an injured employee while pursuing his own affairs owes his employer the duty of reasonable care to avoid aggravation or prolongation of his disability. Under the facts of the instant case, the employee although unable to work the day before (See Exhibit A, Transcript

page 27) because of his bad leg was climbing a ladder in his garage at home when the second injury took place. The second injury was thus the result of an independent intervening cause and did not follow naturally or unavoidably from the first injury. There is no evidence in the record to support any conclusion other than that the second injury could have been avoided by reasonable care.

II

In a Proceeding Under the Longshoremen's and Harbor Workers' Act, the Reviewing Court is Not Bound to Accept the Findings of the Deputy Commissioner.

The Longshoremen's and Harbor Worker's Act, U.S.C.A., Title 33, Section 921 (b) sets forth the conditions under which a compensation order may be set aside. It says in part as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings . . . ."

In discussing findings the Court in *Ocean S. S. Co of Savannah, et al.* vs. *Lawson, et al.*, supra, at page 56, stated:

> "The commissioner found that the maritime industrial injury caused the disability, but was only a contributing cause of the death, without any further explanation. The finding is just as consistent with the conclusion that the infection was caused by Lee's misconduct and neglect of his wound as that it came about unavoidably.

> "The Commissioner and not the court is to find such fact and his conclusions, if supported by evidence, are final. It follows that his fact findings must be specific and be sufficient under the law to support the award. Florida vs. U. S. 282, U. S. 194."

In the instant case there is no finding as to whether or not the employee acted with reasonable care in climbing a ladder under the circumstances existing at that time. It is, thus, submitted that the award of the Deputy Commissioner was "not in accordance with law."

The scope of jurisdictional review in Longshoremen's and Harbor Workers' Act cases was discussed in some detail in the case of *O'Leary* vs. *Brown-Pacific-Maxon,* 340 U.S. 504. In that case both sides admitted that the scope of judicial review of findings of fact in a Longshoremen's and Harbor Workers' Act case was governed by the Administrative Procedure Act of June 11, 1946, in 60 Statute 277, 5 U.S.C. Section 1001, et seq. The court then went on to say at page 508:

> "The standard, therefore, is that discussed in *Universal Camera Corp.* vs. *Labor Board,* ante p. 474. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

The case referred to above, *Universal Camera Corp.* vs. *N.L.R.B.,* 340 U.S. 474, was an appeal of an administrative hearing before the N.L.R.B. One ques-

tion was whether the Administrative Procedure Act affected the scope of review of an administrative hearing before the N.L.R.B. At page 487 the Supreme Court said:

> "And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act."

And, again, at page 488:

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The effect of the Administrative Procedure Act is further explained in the Universal Camera Case at page 490. It is there said:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function Congress has imposed on them responsibiltiy for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited by en-

forcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

It should again be noted that the *Brown-Pacific-Maxon* case, supra., held that the standard for judicial review in Longshoremen's and Harbor Workers' Act case is the same as that discussed in the *Universal Camera Corp. case.* It is for this reason that appellee has quoted at some length from the latter case.

III

Although Proximate Cause as Applied in Tort Cases is Not Applicable to Compensation Cases, a Causal Connection or Relation Between the Injury and the Employment Must be Established.

One of the main questions argued in the District Court was whether or not the doctrine of causal relationship applied to compensation cases such as we have here. It is noted that appellants' brief contains no further discussion of this problem. Appellees still contend it is the root of the problem involved herein. A review of the authorities may be helpful in clarifying this point.

In *Manitowoc Boiler Works* vs. *Industrial Commission,* 163 N.W. 172, a fifteen per cent penalty was added to the award because the employer violated the Commission's rules in failing to guard the wheels of a crane that had killed the employee. In that case the court said: "The chain of physical causation is complete and whether or not the failure to guard is the proximate cause of the injury in the sense in which that term is used in the law of negligence is immaterial." It should be noted that the court still found it necessary to find a complete chain of physical causation.

In the *Hartford Accident and Indemnity Co.* vs. *Cardillo Deputy Commissioner,* 112 F. 2nd 11, the plaintiff was injured in a fight with his superior, who kept calling him "Shorty". The plaintiff called his superior a vile name, and the superior struck him. The claim is made that this did not arise out of his employment. At Page 17 the court said: "The limitation of course, is that the accumulated pressures (on the employee) must be attributable in substantial part to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating outside the working relation and not substantially magnified by it. - - - - - - - -".

In the case of *Avignone Freres, Inc.,* vs. *Cardillo, Deputy Commissioner,* 117 F. 2nd, 385, a diabetic employee in August, 1936, bruised his toe which became infected, leaving a permanently unhealed stump after four amputations. (All the way up to his knee).

His last illness was diagnosed as pneumonia. The death certificate gave cause of death as diabetis. An attending physician testified that the immediate cause of death was due to the particular hemorrhage present at the brain and the death was entirely respiratory. A pathologist said that the employee died of a kidney ailment. Two attending physicians said there was no causal connection or relation between the injury with its consequent series of operations and the man's death. But there was some testimony that all of the above factors resulted in the employee's death. The award was upheld, the court saying at Page 386: "There was abundant testimony to the effect that such an injury to such a man, with such consequences, might cause death and some testimony that it did so." In this case the court clearly indicates that a causal relation between the injury and the employment must be established.

In the *Texas Indemnity Company* vs. *Staggs,* 134 S.W. 2nd, 1026, the employee fell on the steps of his home and struck his head on a concrete block, but went on to work. One and a half hours later he died at work. The court at Page 1028 said: "It is well settled that in a suit under the Compensation Law, it is not necessary for the claimant to show that the injury proximately caused disability or death. Recovery is authorized if a causal connection is established between the injury and the disability, or death. 'Producing cause' is the term most frequently used in compensation cases. - - - - - The approved defiinition of 'proximate cause' in negligence cases, and the approved definition

of 'producing cause' in compensation cases, are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness. - - - - -"

In the case of *Travelers Insurance Co.* vs. *Peters*, 14 S.W. 2nd, 1007, the employee was injured while wheeling coke in a wheelbarrow. He fell on the handle of the wheelbarrow, which had fallen from the platform a distance of four feet. Uremic poisoning set in and he died a week later. The court said at Page 1008: "We are of the opinion that the rule of proximate cause has no application to cases arising under the Workmen's Compensation Act. - - - - - It is true that there must be established a causal connection between an injury and the death of an employee, before a recovery would be authorized. If, however, the injury is shown to be the producing cause of the death, a finding is justified that death was due to the injury, if it arises in the course of and out of the employment. - - - - -"

In the case of *Cudahy Packing Company* vs. *Paramore*, 263 U. S. 418, the cause of action arose under the Utah Workmen's Compensation Law. The accident occurred on a public road when the employee was caught crossing the railroad tracks in a car, and occurred some seven minutes before work started. Under the facts, the accident was held compensible, the court saying at Page 423: "It may be assumed that where an accident is in no manner related to the employment, an attempt to make the employer liable would be so clearly un-

reasonable and arbitrary, as to subject it to the bar of the Constitution; but when the accident has any such relation, we should be cautious about declaring a state statute creating liability against the employer invalid upon that ground." Speaking of liability under the Workmen's Compensation legislation, the court goes on to say: "The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment, because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another, with which the former has no connection; but it is to say that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause. - - - - - Whether a given accident is so related, or incident to the business, must depend entirely upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. The fact that the accident happened on a public road or at a railroad crossing and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of such causal relationship, if the danger be one to which the employee, by reason of and in connection with, his employment, is subjected peculiarly or to an abnormal degree."

In the case of *Truck Insurance Exchange* vs. *Industrial Accident Commission*, 167 P. 2nd, 705, the em-

ployee was killed going in his car from work to his home which was furnished by the employer. It was held that the death was compensible, the court at Page 706 stating: "An injury to be compensible, must arise out of the employment, must be proximately caused by the employment, and the employee at the time of injury, must be performing service growing out of and incidental to his employment and - - - acting within the course of his employment. (Labor Code Section 3600, sub-sections b and c)." The court further added: "A causal connection between employment and an injury by accident on a public road can properly be found where the employee by reason of and in connection with his employment, is peculiarly subject to the danger to which the general public is also exposed."

In the case of *Hanson* vs *Robitshek-Schneider Company,* 297 N. W. 19, the employee left the plant to go and get his car in order to come back to the plant for some samples that he was going to use the next day. He was assaulted by two strangers and died two months later. The death was held compensible, the court at Page 21 stating: "It is significant that in defining compensible accident, the Workmen's Compensation Law makes no mention of cause or causation as such. Impliedly, it thereby rejects or at least modifies, the standard of proximate causation determinative in tort litigation. - - - -" The court went on to say: "So it is enough that injury follows as a natural incident of the work - - - as a result of the exposure occasioned by the nature of the employment. If the employment creates a

special hazard from which injury comes, then, within the meaning of the statute, there is that 'causal relation' between employment and result which many decisions hold essential under the requirement that the injury arose 'out of' the employment."

In the case of *Southern Stevedoring Company* vs. *Henderson,* 175 F. 2nd, 863, a stevedore suffered a coronary thrombosis while working in the hold of a ship. He immediately left the hold by the only means of egress, a perpendicular ladder 30 feet long, but died within 15 minutes after reaching the deck. The evidence was that death was hastened by climbing the ladder, and a heart attack on the deck was actually what killed him. It was held that the death was compensible as one occurring accidentally in the course of employment. The court saying at Page 865: "Under said act, - - -, and the concept of proximate cause as it is applied in the law of torts, is not applicable."; and again at Page 866: "He might have lived a long time if he had rested sufficiently after the first symptoms of his disease appeared; but the conditions of his employment made it necessary for him to climb the ladder in order to leave the industrial prmises." (N.B.— The court is talking about causal connection and trying to tie the death into the employment. Can it be said in our case that the condition of employment made it necessary for claimant to climb the ladder in his own garage two months after the alleged injury of September 6, 1950?) Again at Page 866 the court said: "- - - under the act injury means accidental injury arising out

of and in the course of the employment;". It should be noted that every case cited in this case pertaining to injuries or death of an employee who had a previous disability, relates the death to an incident of the employment. For example, see *London Guarantee and Accident Company vs. Hoage,* 72 F 2nd, 191, where a baker died suddenly from heart failure while working around an oven where the temperature ranged from 110° to 120°. The court sustained an award to the employee's widow, which rested on a Finding that the crises in his heart trouble arose in substantial part from his work and the conditions under which he was working. At Page 868 the court stated: "Appellants state that the medical evidence as to the casual (probably causal) relationship between the exertion in climbing the ladder and the death fifteen minutes later, is conjectural." The court does not state that such causal relationship need not be established, but merely goes on to conclude that the evidence in this particular case was sufficient.

In the case of *Hampton Roads Stevedoring Co.* vs. *O'Hearne,* 184 F. 2nd, 76, the claimant struck his head against a deck beam on June 15, 1948, and died July 17, 1948. The deceased was disabled for all of said 32 days. Deceased had neurosyphilis and medical testimony was that this could have caused death or that the blow could have stirred up the syphilis symptoms. At Page 78, the court said: "- - - - but according to our view, there is substantial evidence tending to show that the blow either was the sole cause of the death,

or that it combined with the previously existing condition of the deceased, to hasten his death." It is to be noted here again, that nothing in this case states that the doctrine of proximate cause does not apply, or that no causal connection need be established.

Two other Federal Court cases have discussed the causal relationship questions in similar cases to the one presented here. In *International Mercantile Marine Company* vs. *Lowe, Deputy Commissioner,* 93 F. 2nd, 663, the cause of action arose under the Longshoremen's Act and the court said: "And Section 8A plainly provides for the right to compensation in case of disability. When death occurs, a new cause of action arises which requires an adjudication on all questions such as accident, notice of death, claim, causal relationship, and dependency."

The case of *Trudenich* vs. *Marshall,* 34 F. Supp. 486, was a case under the Longshoremen's Act. There, on January 2 and January 3, 1940, the employee was carrying heavy sacks, and felt a pain in his chest. Later he was found to have had an attack of coronary thrombosis. The employee was also suffering from angina pectoris. It was held there that the disability was not caused by the injury sustained by employee in the course of his employment, the court saying at Page 488: "Despite its liberality, the act does not allow compensation unless the injury flows from the employment as effect from cause." Thus it is said in *Ayers* vs. *Hoage,* 63 F. 2nd, 364, 365, "An injury arises out of 'the

employment within the meaning of the Compensation Act when it occurs in the course of the employment and as a result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed. The mere fact that the injury is contemporaneous or coincidental with the employment is not a sufficient basis for an award.' (Citing cases).

"In the Madore case (134 A. 259) the court said: 'Before he can make a valid award the trier must determine that there is a direct causal connection between the injury, whether it be the result of accident or disease, and the employment. The question he must answer is: Was the employment a proximate cause of the disability, or was the injured condition merely contemporaneous or coincidental with the employment? If it was the latter, there can be no award!' " Citing other cases).

At Page 489 in the Trudenich case the court said: "So, whether injury followed an unaccounted dizziness, (Citing cases), or pre-existing arteriosclerosis (Citing cases) or an enlarged heart, (Citing cases), or myocarditis (Citing cases) compensation was allowed when the exertion of the workmen accelerated or aggravated his condition, brought on an attack, or brought on other disease directly traceable to the pre-existnig condition."

Based upon the above it is respectfully submitted that the second injury in this case was caused by the

lack of care of applicant in exposing himself to an unreasonable risk having no connection with his employment. In no event can it be said that applicant's second injury "arose out of" his employment and was in the course of his employment. (U.S.C.A. Title 33 Sec. 902 (2))or was causally connected thereto.

Conclusion

From the above authorities it is established that appellants' statement on page 5 of its brief "Fault is Not a Factor in Compensation Law" is much too broad. A distinction must be drawn and is drawn between the negligence of an employee before and after the occurrence of the accident upon which the claim is founded. There is and should be no right to compensation for disability resulting from negligence on the part of the employee subsequent to the original injury. It is respectfully submitted that the subsequent injury in this case was the result of an independent intervening cause and could have been avoided by reasonable care. Since the compensation order of the Deputy Commissioner was not in accordance with law it was properly set aside by the District Court and the order of the District Court should be sustained.

Respectfully submitted,

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